STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2011
v	No. 296078 Montcalm Circuit Court
DALE EDWARD CUTLER, Defendant-Appellant.	LC No. 296078

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, and sentenced as a habitual offender-fourth offense, MCL 769.12, to serve a term of 11 to 25 years' imprisonment, with credit for 61 days served. The trial court also ordered defendant to pay $6,256 in restitution, $785 of which was for lost wages, "with additional reserved." Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's conviction and sentence. However, we vacate the portion of the judgment of sentence requiring defendant to pay restitution of $785 and remand for further proceedings limited to the calculation of post-tax wages.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the beating of Ryan Young. In the early morning hours of June 11, 2009, Young was celebrating his birthday with friends at a local bar. Defendant was also at the bar. Young did not know defendant, but defendant joined Young and his friends at their table and defendant and Young talked and became acquainted. At about 3:30 a.m., Young and defendant were dropped off at Young's apartment. Young testified that he went into his bedroom to change and asked defendant: "did you want to do anything or did you just want to go to bed," to which defendant responded: "yeah, I'm going to do something you fucking faggot." Young testified that defendant choked him "so bad" that he "could not get away from him" and Young thought he was going to die because defendant "wouldn't get off me and just stop punching me." Young believed that he was fighting for his life. Young remembered defendant cutting off his oxygen until he passed out and that, when he came to, defendant was "just still bashing my face in" until he went unconscious again. Young believed defendant hit him "a good 30 times." According to Young, he never tried to touch defendant and neither of them ever fell asleep—except when Young went unconscious from the assault. Young testified

that there was no discussion about flipping the television on or anything and that he believed this was because defendant had the assault already planned.

Defendant's description of the events both prior to and during the assault was somewhat different. Defendant testified that after entering Young's apartment, defendant asked if there was any beer because he assumed they were going to drink, but Young told him he didn't think he had any; defendant looked in the refrigerator and found none. Defendant then stated that he might as well crash and Young told him he could have the bedroom to sleep in because he had a friend who was supposed to come over in the morning and he didn't want her to find a strange guy sleeping on the sofa. Defendant testified that he was tired and crashed on the bed still wearing his shoes. The next thing defendant remembered was waking up "to a very bad smell in my face, really bad alcohol. And there was wetness on my ear and my pants were unzipped and there was pressure on my genital area." Defendant described himself as "in shock." Young was on his side next to defendant with "his mouth on my neck" and "his hand in my pants" and defendant shoved/pushed him over. Young then put his leg over top of defendant, at which time defendant tried to push him away with his hands. Young stopped touching defendant's genitals and punched defendant in the head. According to defendant:

> there was a struggle. I think it was my momentum that threw him off the bed but we ended up rolling off the bed and I ended up on top. . . . I think the hold broke when we fell to the ground. . . . Then I was on top then and I punched him . . . Probably about four or five [times] . . . . Then I got up and left.

Defendant never said anything like "get off of me," and there were no words or conversation during the struggle described by defendant. He admitted that he struck Young and that Young was badly injured, but defendant explained that he was a "pretty good size guy," an unofficial bouncer at the bar, and had trained for cage fights so that he "d[id] strike pretty hard." Defendant explained that the hitting was "an explosive burst" and that Young was on the ground and unconscious when he left. Asked his purpose in striking Young, defendant stated, "I was trying to get him. I wanted to get away but I wanted to make sure he couldn't do anything to me when I left." After leaving, defendant walked "many miles home." Defendant admitted that he never shared his story that Young assaulted him with the police or anyone else before that day in court and never filed a police report regarding the incident.

Young was taken to the hospital that morning by a neighbor. While at the hospital, Young was interviewed several times, initially informing police he thought his attacker was a neighbor against whom he had obtained a personal protection order. The officer who interviewed Young testified that he "was in and out" of consciousness and spent many days in the hospital, and Young testified that he did not recall what he initially told the officer. Eventually, based on Young's account and those of his friends, the police began to believe that defendant was involved in the assault. When police officers went to pick-up defendant from the Kent County Correctional Facility, defendant asked the transporting officer what charge was being brought. The transporting officer informed defendant that the charge was great bodily

harm less than murder. Defendant responded, "how can I be charged with that? I didn't even use a weapon this time."[1]

Following the conclusion of testimony, but prior to closing arguments, defendant requested CJI2d 7.20 and 7.22 for self-defense. The trial court responded:

> Looking at my trial manual, the test for self-defense is whether a defendant honestly and reasonably believed that he was in danger of imminent death or serious bodily harm and used an the amount of force it appeared immediately necessary to protect against that danger. . . . In this particular case I did try to take notes as Mr. Cutler testified. The testimony from the defendant was that he woke to being sexually molested by Mr. Young and that Mr. Young then punched him in the head. The defendant then pushed him back, they rolled off onto the floor, defendant then was on top and then in an explosive burst he punched him four to five times. Mr. Young did not move after that. In conjunction with Mr. Cutler's testimony so far as training for cage fights, being a[n] unofficial bouncer at the bar, and then his testimony in essence as to why he did this that he wanted to get away and make sure that Mr. Young did not follow him. I'm not seeing a basis then for self-defense.
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> It really is somewhat clear from his testimony later on that he did this because he was sexually molested by someone else and just as he never thought about reporting it, he was surprised that Mr. Young would report it. In essence that he got what he deserved and I'm not seeing anything that indicates that Mr. Cutler was in any way in any fear of being assaulted or any type of harm that would justify what he did. The request is noted but it is denied.

It took the jury only 23 minutes to convict defendant.

II. SELF-DEFENSE INSTRUCTION

On appeal, defendant first argues that the trial court erred by denying his request to instruct the jury on self-defense. As this Court explained in *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007):

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or

[1] Testimony revealed that the transporting officer had not asked defendant any questions prior to the statement and there was no conversation afterwards.

> her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instruction sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

A successful self-defense claim requires a defendant to have had an honest and reasonable belief that he was in danger and used only that amount of force necessary to defend himself. See *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Generally, a defendant cannot claim self-defense where he used excessive force, or was the initial aggressor. *Kemp*, 202 Mich App at 322-323.

We find this is a close question. However, having reviewed the record, and the trial court's reasoning for denying the instruction, because the testimony in the record supports the trial court's characterization of the evidence, and the question whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion, *Dobek*, 274 Mich App at 82, we find no abuse of discretion in the trial court's decision to deny the instruction.

The victim was about 5'6", with a thin build at only 130-140 pounds. Defendant was "a pretty good size guy," trained in cage fighting, and was an unofficial bouncer at the bar where he met the victim. According to defendant, the victim initiated the altercation, first by sexually assaulting him and then by punching him once in the head. Defendant testified that, in response, he threw the victim off the bed and "ended up on top" and that, in the process, the victim no longer had hold of him as "the hold got broke when we fell to the ground." Defendant further testified, "Then I was on top then and I punched him" four or five times; "I was trying to get him. I wanted to get away *but I wanted to make sure he couldn't do anything to me when I left*" (emphasis added). After these four or five punches, "[the victim] didn't move." Defendant admitted he caused the severe injuries sustained by the victim and there was no indication that defendant was injured. He further admitted that, based on his cage fight training, "I do strike very hard."

Under the circumstances, even accepting defendant's testimony that the victim sexually assaulted him and punched him once in the head, defendant cannot assert self-defense because he used excessive force to repel the attack he claims was mounted by the victim. Indeed, defendant did not try to merely subdue the victim, but punched the victim in the face hard enough to knock out teeth until the victim was unconscious. Given defendant's fight training and the size difference between him and the victim, this far exceeded the force necessary for defendant to

defend himself. *Kemp*, 202 Mich App at 322. Thus, the trial court did not abuse its discretion in denying defendant's request for self-defense instruction because the evidence did not support it.[2]

III. MRE 404(b)

Defendant next alleges that the failure to redact his statement to police officers constituted a violation of MRE 404(b) because it resulted in the admission of prior bad act evidence.

Defendant made the statement, which we quoted *supra*, while riding in a police car. Defendant concedes that the statement "I didn't even use a weapon" is admissible as an implied admission, but argues that the words "this time" were required to be redacted and that his counsel was ineffective for failing to object to their inclusion.

In *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), this Court held that "a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *Id.*, citing *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Defendant contends that these cases are distinguishable because the words "this time" were not a threat, as were the prior statements found admissible in *Rushlow* and *Goddard*. Although defendant is correct that the statements at issue in those two cases were threats, this Court has never limited *Rushlow*'s application only to prior statements that were threats. Rather, multiple panels of this Court have used *Rushlow* to conclude that the admission of non-threat statements that evidence prior bad acts were admissible. See, e.g., *People v Treadway*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2009 (Docket No. 286573) (admitting statements that the defendant "was not afraid to fight the employees, and that he would 'kill all you motherfuckers' because he was just released from prison after 14 years and was not afraid to return there"); *People v Postell*, unpublished opinion per curiam of the Court of Appeals, issued April 29, 2004 (Docket No. 245728) (holding in a case involving an armed robbery charge that statements the defendant made to his girlfriend "regarding how to mail marijuana to jail would not be inadmissible bad acts evidence"); *People v Payne*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2004 (Docket No. 243032) (holding in a case involving first-degree criminal sexual conduct charge that the defendant's statement that "he traded the complainant in for a 'newer model—when he met [another child]' and that defendant responded by telling her that '[the other child] stole his heart the same way [the complainant] did' was not inadmissible bad acts evidence); *People v Verbruggen*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2002 (Docket No. 231970) (in a first-degree criminal sexual conduct case, holding that the admission of the defendant's statement, "Why don't you shave. If you did shave, you'd look like a ten-year-old and I've fucked ten-year-olds before" did not constitute a prior bad act under MRE 404(b)).

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[2] Because we find no error, we need not address defendant's argument regarding the proper standard under which to evaluate whether an instructional error requires remand.

Furthermore, as these cases make clear, not only does the statement not need to be a threat to be admissible, but the statement is admissible even when it references an act almost identical to the charge. *Payne*, slip op at 3; *Verbruggen*, slip op at 2. Accordingly, there was no error in admitting defendant's entire statement, including the words "this time." Our conclusion that there was no error in the admission of the statement also requires the conclusion that there is no ineffective assistance of counsel for failure to object or redact the statement, as counsel is not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

IV. RESTITUTION

Defendant's final claim on appeal is that the trial court improperly required defendant to pay restitution for the victim's pre-tax lost wages because MCL 780.766(4)(c) requires the order of restitution for income to be calculated on an after-tax basis. The prosecution concedes that the trial court committed plain error in this regard. Accordingly, remand is necessary for the trial court to properly calculate the after-tax amount of lost wages that defendant must reimburse the victim.

V. CONCLUSION

We affirm defendant's conviction and sentence, but vacate the restitution portion of the judgment of sentence as it relates to the victim's lost wages and remand the case only for reconsideration of that issue. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello